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Apportioning Tort Damages in New York: A Method to the Madness

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APPORTIONING TORT DAMAGES IN NEW YORK: A METHOD TO THE MADNESS

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INTRODUCTION

Perhaps the most difficult and confusing aspect of civil practice in New York is the apportionment of damages in cases involving multiple tortfeasors. In a complex case, no fewer than four statutory provisions govern different aspects of the damages calculation.[1] These provisions can interact in ways that the legislature apparently never considered. The most complex of them, Article 16 of the New York Civil Practice and Rules (CPLR), is relatively new, having been enacted in 1986 and subsequently amended in 1996. As cases demanding its interpretation make their way through the court system, problems involving the apportionment of damages promise to become more and more prevalent.

As yet, no court has addressed in a systematic way the interaction of these four statutory provisions. The second circuit made the boldest foray to date, in *In re Brooklyn Navy Yard Asbestos Litigation*,[2] but that case did not involve culpable conduct on the part of the plaintiff—a potentially troublesome ingredient in damages calculations—and the court's methodology failed to take into account a significant factor in apportioning damages among culpable defendants.[3]

This Article proposes a unified formula for calculating damages in complex, multiparty tort cases. While the formula is

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1 *See* N.Y. C.P.L.R. 1401, 1411, 1601 (McKinney 1997) (codifying Articles 14, 14-A, and 16, respectively); N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 1989).

2 971 F.2d 831 (2d Cir. 1992).

3 *See infra* notes 49 & 53 and accompanying text.

my own, it incorporates the available case law and rests on the judgments of New York's most prominent civil practice scholars where no judicial guidance exists. Perhaps the most convincing claim to legitimacy I can offer, however, is the fact that my methodology produces results consistent with the principles motivating the statutory provisions at issue.

I. THE GOVERNING LAW

A. *Contribution Under CPLR Article 14*

The apportionment of damages among tortfeasors has a relatively short history in New York. Until 1972, New York courts—with the tacit approval of the legislature—clung to the common-law doctrine under which courts refused to make judgments of the relative degrees of culpability among wrongdoers.[4] Under this doctrine, with certain exceptions, a tort defendant could not recover from other tortfeasors amounts that the first defendant paid above its relative share of fault.[5] One exception was for indemnification. Where the paying defendant's liability was based entirely on the conduct of some other person—as in the many incarnations of vicarious liability—the defendant had a free-standing cause of action for indemnification in which it could recover all of the judgment it paid.[6] In addition, where the plaintiff sued all possible defendants, each defendant had a statutory right to recover any excess paid over its adjudicated share.[7] But in the common

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[4] *See* Gilbert v. Finch, 66 N.E. 133, 136 (N.Y. 1903) (holding that the release of a joint tortfeasor "operates to discharge" the other tortfeasors absent a reservation of right); Peck v. Ellis, 2 Johns. Ch. 131 (N.Y. Ch. 1816) (noting that "a court of law will not sustain an action between two joint trespassers"); Merryweather v. Nixan, 8 Durn. & E. 186, 101 Eng. Rep. 1337 (K.B. 1799) (denying plaintiff recovery of a contribution from defendant for damages paid by plaintiff in a separate suit).

[5] *See* Ward v. Iroquois Gas Corp., 179 N.E. 317, 318 (N.Y. 1932).

[6] *See* Westchester Lighting Co. v. Westchester County Small Estate Corp., 15 N.E.2d 567, 568–69 (N.Y. 1938). Indemnification is based on the existence of an express or implied contract shifting the entire liability onto the other party.

[7] *See* JACK D. WEINSTEIN ET AL., 4 NEW YORK CIVIL PRACTICE: CPLR ¶ 1401.01 (describing history of contribution in New York). Under section 211-a of the old Civil Practice Act, a defendant who paid more than his pro-rata share of the judgment could recover the excess from another joined defendant. *See id.* Pro-rata shares were determined by simply dividing the judgment by the number of defendants, and no defendant could be forced to pay in contribution more than his pro-rata share. *See Id.*

situation where the plaintiff selected only a "deep-pocket" joint tortfeasor for suit, that unlucky defendant had no recourse against the other joint tortfeasors, even if the absent parties bore much more actual fault.

To soften the perceived harshness of this rule, New York courts expanded the concept of indemnification to include not only true vicarious liability situations, but also cases in which the named defendant could show that its fault was merely "passive," as distinguished from the "active" culpability of some other tortfeasor.[8] If the paying defendant could make that showing, it could recover the entire judgment paid from the "active" tortfeasor. While the active-passive distinction helped some defendants who would otherwise have been stuck with an undeserved bill, it produced arbitrary results governed by a standard that defied consistent application.[9]

Finally, in 1972, the Court of Appeals stepped in to align New York with the overwhelming majority of jurisdictions. In the landmark case of *Dole v. Dow Chemical Company*,[10] the Court of Appeals held that a joint tortfeasor had a right of apportionment based on relative degrees of fault.[11] Recognition of this right necessitated adding a cause of action for "contribution" to the existing common-law indemnification cause of action. In cases involving some version of vicarious liability, the indemnification cause of action would remain, allowing for a

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[8] *See* Jackson v. Associated Dry Goods Corp., 192 N.E.2d 167, 169–70 (N.Y. 1963) (holding that the party seeking indemnity must not be "in pari delicto" with the party against whom recovery is sought; he must be a "passive tortfeasor").

[9] *See* Dole v. Dow Chemical Co., 282 N.E.2d 288, 291 (N.Y. 1972) ("The 'active-passive' test to determine when indemnification will be allowed by one party held liable for negligence against another negligent party has in practice proven elusive and difficult of fair application."). One problem with the active-passive test was that the allegations in the complaint determined whether the defendant could seek indemnification by impleader or cross-claim, leaving a defendant's right to seek recovery at least partly in the hands of the plaintiff. *See* Kennedy v. Bethlehem Steel Co., 125 N.Y.S.2d 552, 552–53 (4th Dep't 1953), *aff'd*, 122 N.E.2d 753 (N.Y. 1954).

[10] 282 N.E.2d 288 (N.Y. 1972).

[11] *See id.* at 295. *Dole* involved a wrongful death action in which the decedent was killed as a result of exposure to a Dow fumigant while at work. *See id.* at 290. Dow impleaded the employer for indemnification, arguing that the employer's failure to instruct its employees in the use of the product was the "active" fault, while any fault on Dow's part for insufficient warnings was only "passive." *See id.* The Court of Appeals abandoned the active-passive distinction and held that Dow could implead the employer even if Dow's fault was to some degree active on a contribution theory. *See id.* at 295.

complete shift of liability. Where joint tortfeasors each bear some share of fault, however, the contribution cause of action would henceforward allow any one tortfeasor paying more than its share to recover the excess from the others.

In 1974, the legislature codified *Dole*'s contribution theory in Article 14 of the CPLR. CPLR 1401 establishes the basic right to contribution among joint tortfeasors.[12] CPLR 1402 provides that contribution is to be determined based on equitable shares of fault.[13] CPLR 1403 provides the procedural mechanisms by which contribution may be sought.[14] CPLR 1404 makes clear that the plaintiff's right to recover the full judgment from any one joint tortfeasor remains intact and that indemnification remains a viable cause of action in appropriate cases.[15]

B. Limitations on Contribution Under General Obligations Law section 15-108

Dole caused an unintended problem that the legislature addressed at the same time it passed Article 14. After *Dole*, when a plaintiff sued two or more defendants and then settled with one, the non-settling defendant could implead the settling defendant back into the case to seek contribution. That created a powerful incentive not to settle, because a defendant could never be certain that the settlement would buy peace. To remedy this problem and encourage settlements, the legislature passed General Obligations Law (GOL) section 15-108.[16]

Like Article 14, GOL section 15-108 applies in personal injury, property damage, and wrongful death cases. The statute preserves the plaintiff's right to pursue any remaining tortfeasors after a settlement, but cuts off the settling defendant's right to seek contribution from the others.[17] Thus, a settling defendant is stuck with his bargain if he pays more in settlement than he would have had to pay pursuant to the verdict. By the same token, the plaintiff's right to recover from

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[12] N.Y. C.P.L.R. 1401 (McKinney 1998). The provision is limited to "two or more persons who are subject to liability for damages for the same personal injury, injury to property, or wrongful death." *Id.*

[13] *Id.* 1402.

[14] *Id.* 1403.

[15] *Id.* 1404.

[16] N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 1999).

[17] *Id.* § 15-108(c) ("A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.").

the remaining defendants is reduced by the greater of the stipulated settlement amount, the amount actually paid in settlement, or the settling defendant's equitable share of liability.[18] This provision has the effect of sticking the plaintiff with her bargain; if she gets less from the settling defendant than the jury would have assessed against that defendant, the plaintiff must absorb the difference. Finally—and most importantly for defendants considering settlement—the statute bars any non-settling defendants from seeking contribution from the settling defendant.[19]

Initially, the provision in the statute limiting the amount the plaintiff can recover from the non-settling defendants caused confusion in cases where more than one defendant settles. For example, assume that plaintiff, P, has sued three defendants, D_1, D_2, and D_3. P settles with D_1 for $45,000 and with D_2 for $10,000. D_3 does not settle, and at trial the jury awards $100,000 in damages and finds D_1 5% liable, D_2 55% liable, and D_3 40% liable. D_3 has a right to a reduction in the amount it must pay of the greater of the settlement amounts or the settling defendants' equitable shares of fault. Defendants in D_3's position argued that they should be able to pick the greater amount for each settling defendant. In the hypothetical case, then, D_3 would argue that it could get a reduction of $45,000 for D_1 plus $55,000 for D_2 (55% of $100,000) for a total of $100,000, thus effectively wiping out its liability. In *Didner v. Keene Corp.*,[20] the Court of Appeals rejected that theory, concluding that the non-settling defendant gets a reduction equal to the greater of the *aggregate* settlement amounts or the *aggregate* shares of fault. Thus, in the hypothetical case, D_3 would get a reduction of $60,000 (5% of $100,000 plus 55% of $100,000), leaving it with a well-deserved liability of $40,000.

C. *Comparative Fault Under CPLR Article 14-A*

Joint defendants had not been the only ones suffering under

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[18] *Id.* § 15-108(a) ("[A] release ... does not discharge any of the other tortfeasors from liability ..., but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipuleted [sic] by the release of the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasors equitable share of damages ..., whichever is the greatest.").

[19] *Id.* § 15-108(b) ("A release given ... to one tortfeasor ... relieves him from liability to any other person for contribution ....").

[20] 624 N.E.2d 979 (N.Y. 1993).

the rigid pre-*Dole* liability regime. Under New York's draconian common-law contributory negligence doctrine, a plaintiff who was shown to bear any responsibility for her injury could recover nothing.[21] Despite mounting criticism of the contributory negligence doctrine after *Dole*, the Court of Appeals refused to move toward a more lenient comparative negligence regime, expressly leaving the subject to the legislature.[22] Shortly after passing Article 14, the legislature responded by adding Article 14-A, which has the effect of including any culpability on the plaintiff's part in the damages apportionment calculus.

Article 14-A adopts a pure comparative fault regime for tort damages.[23] The plaintiff may recover for any share of fault for which the defendants are liable, even if the plaintiff's share of fault exceeds 50% and regardless of whether the plaintiff's fault is characterized as "contributory negligence," "assumption of the risk," or something else.[24]

Following the passage of Article 14-A, questions arose about how to apportion damages where a contributorily negligent plaintiff settles with some, but not all defendants. In *Whalen v. Kawasaki Motors Corporation, U.S.A.*,[25] the Court of Appeals offered a partial answer. Again, under GOL section 15-108, the liability of a non-settling defendant is reduced by the greater of the settlement amounts or the shares of fault of the settling defendants. In *Whalen*, the plaintiff settled prior to trial with the defendant Kawasaki for $1,600,000.[26] The plaintiff continued to trial against the second defendant, Robinson, and

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[21] *See* WEINSTEIN ET AL., *supra* note 7, ¶ 1401.07 (describing background to contributory negligence rule).

[22] *See* Codling v. Paglia, 288 N.E.2d 622, 630 (N.Y. 1973) (acknowledging that the doctrine has been criticized but holding that it is "a topic now more appropriate for legislative redress").

[23] *See* N.Y. C.P.L.R. 1411 (McKinney 1997). Like the contribution regime in Article 14, Article 14-A applies in any action to recover damages for personal injury, injury to property, or wrongful death. It is not limited to negligence actions.

[24] The practice commentaries to N.Y. C.P.L.R. 1411 explain that the plaintiff may be barred from any recovery if the plaintiff's injuries "are the direct result of his commission of . . . serious criminal or illegal conduct," if the plaintiff "expressly" assumes the risk, or if the plaintiff assumes the risk in a way that relieves the defendant's duty to the plaintiff, such as where a person voluntarily engages in athletic activities. N.Y. C.P.L.R. 1411 (practice commentary) (quoting Barker v. Kallash, 468 N.E.2d 39, 42 (N.Y. 1984)).

[25] Whalen v. Kawasaki Motors Corp., U.S.A., 703 N.E.2d 246 (N.Y. 1998).

[26] *See id.* at 247.

no evidence of Kawasaki's culpability was introduced.[27] The jury returned a verdict for plaintiff in the amount of $2,415,000, but found plaintiff 92% at fault and Robinson 8% at fault.[28] Robinson argued that the plaintiff's share of fault (92% of $2,415,000 or $2,221,800) should be subtracted from the total liability first and then Kawasaki's settlement should be subtracted from what remained.[29] That would leave Robinson with no liability ($2,415,000 - $2,221,800 - $1,600,000 = - $1,406,800). The Court of Appeals disagreed, holding that the settlement should be subtracted first and then the remaining damages ($2,415,000 - $1,600,000 = $815,000) split between the plaintiff and Robinson. That left Robinson with a liability of $65,200 (8% of $815,000). [30]

Unfortunately, *Whalen* is not the last word on the interaction of Article 14-A and GOL section 15-108. It does not explain how to calculate damages where the jury determines the settling defendant's share of fault, as would normally occur to allow the court to determine whether the actual settlement or the percentage share of fault is greater for purposes of applying GOL section 15-108. This is an issue I will return to in describing the assumptions that underlie my formula.

D. Limitations on Joint and Several Liability Under CPLR Article 16

In 1986, the legislature took its boldest step yet to modify the relative liability of joint tortfeasors. Under traditional rules of joint and several liability, a defendant with any share of the liability—even one percent—can be forced to pay the full judgment and then seek contribution from the others. But the right to seek contribution offers little comfort when the other tortfeasors are judgment-proof. Although *Dole* and its statutory counterparts eased some of the burden on joint tortfeasors by providing a procedural avenue for recovering excess damages paid, they did little to help the deep pocket who gets stuck paying an award for insolvent co-defendants.

Municipalities have frequently found themselves in this

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[27] *See id.*

[28] *See id.*

[29] *See id.* at 249.

[30] *See id.* at 249–51 (explaining the reasoning behind the Court's adoption of the "settlement-first" approach).

position. Often a person injured by the negligence of a private party will name the municipality as a co-defendant, alleging that poor lighting or bad roads or something else of that kind contributed to the accident.[31] The municipality ends up paying the full judgment and then taking its chances recovering from the other culpable parties. As part of a broader tort reform package passed in 1986, municipalities—aided by liability insurers—prevailed on the legislature to put some of the financial burden resulting from insolvent defendants on the plaintiff. The resulting legislation was codified as Article 16 of the CPLR.[32]

Under certain circumstances, Article 16 limits the liability of a joint tortfeasor whose share of the fault is 50% or less to that tortfeasor's actual percentage share of the damages. The statute applies only to non-economic damages (e.g., pain and suffering),[33] meaning such a tortfeasor will still potentially have to pay 100% of the economic damages (e.g., medical bills, lost wages, etc.). Nevertheless, a minor tortfeasor can see substantial savings. For example, assume P proves $20,000 in economic damages and $80,000 in non-economic damages. The jury finds D_1 70% at fault and D_2 30% at fault. Under traditional rules, D_2 could be forced to pay the full $100,000 award. Under Article 16, however, the most D_2 could be required to pay would be $44,000 (the full economic damages plus 30% of the non-economic damages). If D_2 paid that amount, under Article 14 it would then have the right to recover $14,000 (the excess it paid over its share of the economic damages) from D_1.

The limitations on joint and several liability in Article 16 apply only to claims for personal injury. In addition, for purposes of determining the defendants' relative shares of fault, the culpability of any absent tortfeasor is to be considered only if the plaintiff could have obtained jurisdiction over that person "with due diligence."[34] Furthermore, Article 16's limitation on liability does not operate at all in certain common joint and several liability situations, the most important being "actions

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[31] *See* DAVID D. SIEGEL, NEW YORK PRACTICE § 168A (3d. ed. 1999).

[32] N.Y. C.P.L.R. 1600–03 (McKinney 1997).

[33] *See id.* 1600 (defining non-economic loss to include pain and suffering, mental anguish, and loss of consortium).

[34] *Id.* 1601(1).

requiring proof of intent"[35] and claims against persons held liable by reason of the "use, operation, or ownership of a motor vehicle."[36]

Article 16 expressly provides that it is not to be construed "to affect or impair any right of a tortfeasor under section 15-108 of the general obligations law."[37] Thus, in cases in which Article 16 applies, a settlement by fewer than all defendants calls for an adjustment of damages based both on GOL section 15-108 and on Article 16. Under Article 14-A, any share of fault borne by the plaintiff must also be considered. The resulting damages calculation can be, to say the least, complicated. As yet, no court has attempted a comprehensive reconciliation of all these statutes. The remainder of this Article offers such reconciliation. Needless to say, not all four statutory provisions apply in every case. For purposes of this Article, I will explain the methodology using as an example a case involving all four provisions. I hope by doing so to show that the methodology will work when all apply. In simpler cases, any unnecessary steps can simply be omitted and the method still works.

II. THE ASSUMPTIONS

Because of the lack of case law synthesizing the statutes, it is not clear what priority to give the various provisions. Accordingly, I made three major assumptions based on the available authority and the apparent purpose of the statutes. These assumptions address: (1) the application of Article 16 where the plaintiff bears some of the fault; (2) the allocation of damages between economic and non-economic categories for Article 16 purposes; and (3) the apportionment of liability among remaining culpable parties after the GOL section 15-108 set-off.

A. The Interaction of Article 16 and Article 14-A

The first assumption involves the effect of any fault of the plaintiff on the computation of the defendants' shares under Article 16. Article 16 does not make clear whether its limitations apply to any defendant with 50% or less *of the total* fault, or to any defendant with 50% or less *of the defendants'*

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[35] *Id.* 1602(5).
[36] *Id.* 1602(6).
[37] *Id.* 1601(2).

share of the fault, excluding any culpability on the part of the plaintiff.[38]

The distinction can make a difference. For example, in *Robinson v. June*,[39] an assault case, the jury found a tavern owner 50% liable, the two patrons who committed the assault 45% liable, and the plaintiff 5% liable. The tavern owner argued that, because its share of fault was only 50% of the total fault, it was responsible only for its equitable share of the plaintiff's non-economic damages under Article 16.[40] The plaintiff contended that the tavern owner should get the benefit of Article 16's limitations only if its share of the fault *borne by the defendants* (not counting the plaintiff's share) was 50% or less.[41] The Supreme Court of Tompkins County agreed with the plaintiff. It removed the plaintiff's percentage share and then extrapolated the remaining 95% of the fault to 100% to determine the relative percentage shares of the defendants.[42] Because the tavern owner's extrapolated share was 52.6% (50% ÷ 95% = 52.6%), the court held the tavern owner jointly liable for all damages attributed to the defendants.

No court higher than the *Robinson* court has addressed this question. But the rationale enunciated by the *Robinson* court is a strong one, and suggests that its decision should be followed. The court stressed that joint and several liability traditionally existed to protect the plaintiff:

> The policy behind the common-law rule which imposes joint and several liability upon tortfeasors who contribute, in whatever degree, to the same injury is based upon the sense that compensation of the relatively innocent victim serves a more important purpose than striking a nuanced balance between and among the relatively guilty.[43]

The court then noted that Article 16 exists to remedy the injustice that can occur "where the disparity between minor fault and major financial punishment becomes extreme."[44] Finding

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[38] *See* N.Y. C.P.L.R. 1601 (McKinney 1998) (using language in CPLR 1601—"the total liability assigned to all persons liable" and "the relative culpability of each person causing or contributing to the total liability"—that is unclear).

[39] 637 N.Y.S.2d 1018 (N.Y. Sup. Ct. 1996).

[40] *See id.* at 1022.

[41] *See id.* at 1022–23.

[42] *See id.*

[43] *Id.* at 1022.

[44] *Id.*

that no such disparity existed, given the fact that the jury found the tavern owner 50% at fault, the court concluded that the tavern owner should not get the benefit of the rule.[45]

Professor David Siegel concurs. Calling the issue "a fundamental one," he argues that the removal of the plaintiff's percentage share is "[p]robably more consistent with the overall structure of Article 16."[46] Given the extensive list in CPLR 1602 of circumstances in which the limitations on liability do not apply, Professor Siegel concludes that the legislature would have excluded the plaintiff's share if they had considered the issue.[47] Based on *Tompkins* and Professor Siegel's analysis, I assume that the plaintiff's percentage share of fault is not considered in calculating the defendants' relative percentage shares for Article 16 purposes. Note that this question is separate from the one answered by the Court of Appeals in *Whalen*, which addressed the point at which plaintiff's share of the *damages* should be removed for purposes of applying GOL section 15-108.[48]

B. *Identifying Economic and Non-Economic Damages After Settlement with Fewer Than All Defendants*

The second assumption involves the identification of economic and non-economic damages for purposes of apportionment under Article 16. The potential difficulty here stems from the apportionment of damages after a settlement with fewer than all defendants. It will not always be clear that every defendant should bear the same proportion of economic and non-economic damages; a settlement might even stipulate that it is for one or the other. It could be argued in some cases

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[45] *See id.* The *Robinson* court also cited the shibboleth that statutes in derogation of the common-law should be construed narrowly and pointed out that CPLR 1603 puts the burden of establishing the right to "separate" liability on the defendant. *Id.*

[46] SIEGEL, *supra* note 31, § 168B.

[47] *See id.* Professor Seigel points out an interesting anomaly that can occur if the plaintiff's share is removed. In a case to which Article 16 applies, assume the jury finds $100,000 in non-economic damages and finds P 40% at fault, D_1 40% at fault, and D_2 20% at fault. Removing P's share leaves D_1 with 66.6% of the remaining fault. If D_2 is insolvent, D_1 picks up the whole tab and the plaintiff recovers $60,000 from D_1. But if in the same case the jury finds P only 20% at fault and both D_1 and D_2 40% at fault, each defendant will bear only 50% of the remaining fault. Thus, if D_2 cannot pay, P can collect only D_1's $40,000 equitable share. The more innocent plaintiff collects less.

[48] *See supra* notes 25–30 and accompanying text.

that the damages left after settlement are entirely economic, potentially leaving the remaining defendants without the benefit of Article 16. The jury's verdict, however, will allocate the *total* damages—not taking settlements into account—to economic or non-economic categories. Both the *Brooklyn Navy Yard* court and a state trial court have concluded that the best way to avoid problems is simply to assume that the proportion of economic to non-economic damages prescribed by the jury for the total damages is the same as the proportion of economic to non-economic damages for the damages remaining after settlement.[49] I follow that suggestion.

C. *Calculating the Judgment After the Section 15-108 Set-off*

The third and final assumption involves the calculation of the judgment to be entered against the non-settling defendants after the GOL section 15-108 set-off. After the shares of the settling defendants are removed, a pot of damages will remain to be allocated among the non-settling defendants. Determining the judgment to be entered against each defendant requires removing any culpability assigned to the plaintiff and then apportioning the remaining damages against the defendants in accord with Article 16.

The key to understanding the damages calculation is to recognize that all culpable parties—including culpable plaintiffs and non-settling defendants—collectively bear responsibility for 100% of the damages remaining after the GOL section 15-108 set-off.[50] Assuming the settling defendant(s) also bear some degree of fault, however, the percentages of fault assigned to the plaintiff and non-settling defendants will not add up to 100%. To figure out what share of the damages to assign to each culpable party, we must figure out each party's *proportional* share of the damages remaining after the GOL section 15-108 set-off such that collectively the remaining parties account for 100% of those damages. The way to do that is to remove the percentage share of fault assigned to the settling defendant(s) and then

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[49] *See In re* Brooklyn Navy Yard, 971 F.2d 831, 849 (2d Cir. 1992); Court Decisions, *Court Keeps Liability as Set by Jury for Remaining Tortfeasor*, Dominguez v. Fixrammer Corp., N.Y. L.J, Mar. 13, 1997, at 25.

[50] This point is implicit in the *Whalen* decision, in which the Court held that the GOL § 15-108 set-off should be made before any fault on the plaintiff's part is taken into account. *See supra* notes 25–30 and accompanying text.

extrapolate the remaining parties' shares of fault out to 100%. Some examples should help make this clear.

Assume P sues D_1, D_2 and D_3 and settles with D_1 for $40,000. The jury returns a verdict for $100,000 in non-economic damages and finds P 20% at fault, D_1 20% at fault, D_2 30% at fault, and D_3 30% at fault. Assuming all defendants get the benefit of Article 16, both D_2 and D_3 would bear only several liability for the non-economic damages, since they are each 50% or less at fault. Under *Whalen*, the first step in the damages calculation is to perform the GOL section 15-108 set-off. In this case, because the actual settlement was greater than the settling defendant's equitable share of the damages, the settlement amount of $40,000 is removed, leaving a pot of damages of $60,000 to be split among the plaintiff and the non-settling defendants.

Again, the plaintiff and the non-settling defendants should collectively bear responsibility for 100% of that $60,000. To calculate each of their equitable shares, we must extrapolate their percentage shares of fault out to 100% and then multiply the resulting percentages by the $60,000 in damages remaining after the application of GOL section 15-108. The removal of D_1's percentage share leaves 80% of the fault remaining. Extrapolating the shares of P, D_2 and D_3 leaves P responsible for 25% of the remaining damages (20% ÷ 80% = 25%), and D_2 and D_3 each responsible for 37.5% of the remaining damages (30% ÷ 80% = 37.5%). Thus, a judgment would be entered against each defendant for $22,500 (37.5% X $60,000 = $22,500). With the plaintiff absorbing its share of $15,000 (25% X $60,000 = $15,000), the full $60,000 has been allocated among the culpable parties and none is responsible above its equitable share.[51]

Things get a little trickier where the damages include both economic and non-economic components, so that the defendants potentially have joint liability for part of the damages but only several liability for the rest. Assume in the above hypothetical

[51] Note that the plaintiff and the defendants split the windfall created by D_2's excessive settlement. D_2 should have been liable for only $20,000, but settled for $40,000. Of the $20,000 difference, P saw a $5,000 reduction in its share and the defendants each saw a $7,500 reduction in their shares. This will be the result whenever the settling defendant pays more than its equitable share in settlement. In a case in which the equitable share is greater, the plaintiff will pay exactly its adjudicated percentage of the total damages and will also absorb the difference between the settlement amount and the settling defendant's equitable share. The example given in Part III demonstrates that scenario.

that the jury awarded $20,000 in economic damages and $80,000 in non-economic damages. The GOL section 15-108 set-off leaves damages of $60,000. Under my second assumption, we allocate that amount to economic and non-economic categories in the proportion assigned by the jury, so that $12,000 is considered economic damages (20% x $60,000 = $12,000) and $48,000 is considered non-economic damages (80% x $60,000 = $48,000).

Assuming the defendants get the benefit of Article 16, they would each be jointly liable for the full $12,000 in economic damages, but only severally liable for the $48,000 in non-economic damages, because each is 50% or less at fault. But we still need to know each party's equitable share, so we perform the same extrapolation, again leaving the plaintiff with a 25% equitable share and each defendant with a 37.5% equitable share. Instead of simply multiplying those extrapolated percentages by the total remaining damages, however, two separate calculations must be made. First, the plaintiff's share of the economic damages is removed, leaving $9,000 in economic damages allocated to the defendants (75% of $12,000 is $9,000). The defendants are jointly liable for that amount, meaning each could be forced to pay the full amount. (To the extent either pays more than its equitable share of $4,500 (37.5% x $12,000 = $4,500), however, it can seek contribution from the other under Article 14. But each defendant is only severally liable for its share of the non-economic damages. Each defendant's several liability is determined by multiplying its equitable share by the total non-economic damages left after the GOL section 15-108 set-off. Thus, each defendant is liable for $18,000 in non-economic damages (37.5% x $48,000 = $18,000). The judgment to be entered against each defendant is $27,000 (the full $9,000 in economic damages plus the $18,000 in non-economic damages).

This step in the analysis is where the court erred in *Brooklyn Navy Yard*. The court described a hypothetical case involving three defendants, A, B, and C, in which the jury awards $75,000 in non-economic damages and $25,000 in economic damages, and finds each defendant 33.3% at fault. The plaintiff has settled with A for $39,000. B and C both get the benefit of Article 16. After removing A's settlement share of $39,000 (the greater of the actual settlement or A's equitable share of the damages), B and C are responsible for a total of $61,000 in damages. The court assumed that the $61,000 total

damages should be divided into economic and non-economic shares in the proportion determined by the jury, so that B and C would be jointly liable for 25%, or $15,250, but only severally liable for the remaining 75%, or $45,750.[52] Instead of extrapolating to calculate B and C's equitable shares of the liability remaining after the operation of GOL section 15-108 and then multiplying that percentage by the remaining non-economic damages, the court used the defendants' original percentage shares of fault (33.3%) to determine the judgments that should be entered. Multiplying those percentages by the amount of non-economic damages, the court concluded that each defendant would be liable for $25,000 in non-economic damages (33.3% x $75,000 = $25,000). The court thus concluded that a judgment should be entered against B and C for $40,250 each ($15,250 in economic damages plus $25,000 in non-economic damages).

The problem with that result is that it could allow the plaintiff to collect more from either B or C than the legislature apparently intended. Under GOL section 15-108, B and C share liability for no more than $61,000. Of that amount, they are jointly liable for the economic damages of $15,250. Either one could be forced to pay that full amount and would be entitled to contribution from the other for any excess paid over the payor's equitable share. With respect to the non-economic damages of $45,750, however, neither one should have to pay more than its equitable share, even if the other is insolvent. As a consequence, the judgments entered against B and C for non-economic damages should not exceed $45,750. Under the court's approach in *Brooklyn Navy Yard*, judgments would be entered against B and C for $25,000 each in non-economic damages, or $50,000 total. Although the plaintiff could not actually recover the excess $4,250 above its non-economic damages ($50,000 – $45,750 = $4,250), if one defendant is insolvent, the potential exists under this approach for the plaintiff to collect more from the other defendant than Article 16 should allow.[53] Following my third

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[52] *See supra* note 49 and accompanying text.

[53] The *Brooklyn Navy Yard* court, perhaps unintentionally, intimated that its formula could result in an unduly low verdict for the plaintiff. *Brooklyn Navy Yard*, 971 F.2d at 849–50 n.6. In the hypo I gave in the text, assume D_1 settles for $35,000 instead of $45,000. Under GOL § 15-108, the damages should be reduced by D_1's equitable share of the damages (40% x $100,000 = $40,000) leaving total damages after settlement of $60,000 ($100,000 – $40,000 = $60,000). Again, under the court's approach, the defendants would be liable for their raw shares, or $30,000 each. That

assumption—that the judgments should be computed on the basis of all culpable parties' extrapolated percentages of fault after the GOL section 15-108 set-off—removes this possibility.

It is important to note that the extrapolation done at this stage is solely for purposes of determining the *amount* of damages; it plays no role in deciding whether any defendant gets the benefit of several-only liability for non-economic damages under Article 16. That determination is made based on the first extrapolation (which removes the plaintiff's share of fault for Article 16 purposes) and does not change. [54]

III. THE FORMULA

Because lawyers as a profession tend to recoil from numbers, I have tried to make the following formula as simple as possible. I've broken it down into steps applying each of the statutory commands, and I use a hypothetical case to demonstrate the application at each step. Capitalized terms have consistent meanings, as is apparent from the context. The formula provides all the calculations necessary to apply CPLR Articles 14, 14-A, and 16 and GOL section 15-108. Not every case will implicate every one of these provisions. Some cases will not involve comparative fault on the plaintiff's part, others will not involve a settlement. At each step, I indicate how the formula should be modified to account for the absence of one or more of these elements.

My hypothetical case involves a single plaintiff, P, who has suffered a personal injury at a construction site as a result of the joint negligence of three private party defendants, D_1, D_2, and D_3. Prior to trial, P settles with D_1 for $10,000. The case against D_2 and D_3 proceeds to trial and verdict. The jury finds that P has suffered $100,000 in damages, of which $20,000 is economic damages and $80,000 is non-economic damages. The jury finds

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would leave the plaintiff collecting total damages of only $95,000, rather than the $100,000 awarded by the jury. But that is precisely the result the legislature intended under GOL § 15-108: the plaintiff settled with D_1 for too little and must bear the burden of its own bad bargain. The court's formula in *Brooklyn Navy Yard*, then, causes problems only when the settlement is for *more* than the settling defendant's actual share of the damages.

[54] In the formula given in Part III, the first extrapolation, which determines whether the defendants get the benefit of Article 16, occurs in Step 1. The second extrapolation, which determines the analytically distinct question of the judgments to be entered against non-settling defendants, occurs in Step 4.

further that P was 10% at fault, D_1 was 20% at fault, D_2 was 50% at fault, and D_3 was 20% at fault. The issue: What judgments should be entered against D_2 and D_3?

Step 1:

The first step is to determine each defendant's Share of Fault for CPLR Article 16 purposes. This step will tell us which defendants will ultimately be jointly liable for all damages and which will have several-only liability with respect to non-economic damages. The calculation of the defendants' Shares of Fault should be made after the plaintiff's share of fault, if any, is removed. To do this, the plaintiff's percentage share is removed and the defendants' shares are extrapolated out to 100%.[55]

Example:

The jury determined that P was 10% at fault. To extrapolate the defendants' shares, simply divide each defendant's share by 90% (the percentage remaining after P's share is removed). D_1 then has a 22% Share of Fault, D_2 has a 56% Share of Fault, and D_3 has a 22% Share of Fault. Accordingly, D_2 will be jointly liable for all damages, while D_3 will be jointly liable for economic damages but only severally liable for non-economic damages. D_1, having settled, has no further liability.

If the plaintiff has no share of the fault, this step should be skipped and the application of Article 16 determined based on the percentage shares of fault assigned to the defendants by the fact-finder.

Step 2:

The next step, under GOL section 15-108, is to determine the Total Remaining Damages to be allocated among all culpable parties by subtracting from the total liability the greater of either the aggregate percentage share of the damages of the settling defendants or the aggregate settlement amounts agreed to by the settling defendants.[56]

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[55] *See supra* notes 38–48 and accompanying text.

[56] *See supra* note 20 and accompanying text.

Example:

The total damages found by the jury are $100,000. Prior to trial, D_1 settled with P for $10,000. D_1's culpability, however, was 20%. Because D_1's percentage share of the damages, $20,000, is greater than the $10,000 settlement amount, the remaining damages are reduced by D_1's share of the damages. Thus, the Total Remaining Damages are $100,000 – $20,000 = $80,000.

This step should be skipped if there have been no settlements.

Step 3:

Applying Article 16 requires determining what proportion of the Total Remaining Damages is economic and what proportion is non-economic. To do this, assume that the proportion of economic to non-economic damages is the same for Total Remaining Damages as it was for the full damages amount.[57] Then multiply the Total Remaining Damages by the percentage attributable to each category.

Example:

Of the $100,000 in total damages, $20,000 was for economic damages and $80,000 was for non-economic damages. Accordingly, the Remaining Economic Damages will be 20% of the Total Remaining Damages, or $16,000 (20% x $80,000 = $16,000). The Remaining Non-economic Damages will be 80% of the Total Remaining Damages, or $64,000 (80% x $80,000 = $64,000).

Step 4:

The plaintiff and the non-settling defendants are collectively responsible for the Total Remaining Damages. Determining the actual judgments to be entered against the non-settling defendants requires determining each defendant's Equitable Share of the Remaining Liability. That is done by removing the settling defendants' shares of fault and then extrapolating the defendants' (and the plaintiff's) shares of fault out to 100%.[58] The resulting figures will be used in calculating each defendant's

[57] *See supra* note 49 and accompanying text.

[58] *See supra* notes 520–531 and accompanying text.

right to contribution under CPLR Article 14 and in calculating any defendant's reduced liability for non-economic damages under Article 16. Keep in mind that these Equitable Shares of the Remaining Liability are for the purpose of determining the amount of damages only; they do not affect the determination of whether the defendants get the benefit of Article 16. That determination was made in Step 1 and does not change.

Example:

D_1's share of fault as determined by the jury is 20%. That leaves P, D_2, and D_3 collectively responsible for 80% of the liability. Extrapolating their equitable shares to 100% leaves D_2 with an Equitable Share of the Remaining Liability of 62.5% (50% ÷ 80% = 62.5%), and D_3 with an Equitable Share of the Remaining Liability of 25% (20% ÷ 80% = 25%). P is responsible for 12.5% of the Total Remaining Damages (10% ÷ 80% = 12.5%), which is equivalent to 10% of the total damages. [59]

If there have been no settlements, this step should be skipped and the shares of fault assigned by the fact-finder should be used to calculate the judgments to be entered against each defendant. If there has been a settlement, but the plaintiff has no share of the fault, this step should still be taken using only the non-settling defendants' shares of fault.

Step 5:

The next step is to determine the amounts of Remaining Economic Damages and Remaining Non-economic Damages for which the non-settling defendants are liable. This will tell us the maximum amount of damages the plaintiff will be entitled to recover. It is done by removing the shares of those damages for which the plaintiff is responsible. The resulting amounts are the Defendants' Remaining Economic Damages and the Defendants' Remaining Non-economic Damages. The sum of these two amounts is the total amount of damages the plaintiff can recover.

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[59] In fact, P ultimately will bear more than its equitable share of the total damages because P made a bad settlement with D_1. P released D_1 for less than D_1's equitable share so P will have to absorb the difference. *See supra* note 51 and accompanying text.

Example:

P is responsible for 12.5% of both the Remaining Economic Damages and the Remaining Non-economic Damages. Removing those shares leaves $14,000 in Defendants' Remaining Economic Damages (87.5% x $16,000 = $14,000) and $56,000 in Defendants' Remaining Non-economic Damages (87.5% x $64,000 = $56,000). Thus, the plaintiff can recover a total of $70,000 ($14,000 + $56,000 = $70,000).

If the plaintiff has no share of the fault, this step should be skipped. In such a case, the Remaining Economic Damages are the same as the Defendants' Remaining Economic Damages and the Remaining Non-economic Damages are the same as the Defendants' Remaining Non-economic Damages. The plaintiff is entitled to recover the full amount of the Total Remaining Damages.

Step 6:

The final step is to determine the judgment to be entered against each non-settling defendant. Each defendant is jointly and severally liable for all of the Defendants' Remaining Economic Damages. In addition, any defendant with a Share of Fault greater than 50% (from Step 1) will be jointly liable for all of the Defendants' Remaining Non-economic Damages. Judgment will be entered against any such defendant for the sum of those two amounts. Other defendants are only severally liable for the Remaining Non-economic Damages. To calculate the judgment to be entered against such a defendant, multiply the defendant's Equitable Share of the Remaining Liability (from Step 4) by the Remaining Non-economic Damages[60] and add that figure to the full amount of the Defendants' Remaining Economic Damages.

Example:

Because D_2 has a Share of Fault greater than 50%, D_2 is jointly liable for the Defendants' Remaining Economic Damages

[60] Note that the correct figure here is the Remaining Non-economic Damages and not the *Defendants'* Remaining Non-economic Damages. To calculate each defendant's several liability for non-economic damages, multiply that defendant's Equitable Share of the Remaining Liability by the entire amount of the Remaining Non-economic Damages. The *sum* of the resulting amounts is the Defendants' Remaining Non-economic Damages.

and Remaining Non-economic Damages. Judgment should be entered against D_2 in the amount of $70,000. D_3, however, has a Share of Fault of 50% or less. D_3 is jointly liable for all of the Defendants' Remaining Economic Damages but only severally liable for the Remaining Non-economic Damages. Judgment should be entered against D_3 in the amount of $30,000 ((25% x $64,000 = $16,000) + $14,000 = $30,000).

Addenda

Two final points should be kept in mind. First, P cannot recover more than the total amount for which the non-settling defendants are liable. That amount is $70,000 (see Step 5). Thus, even though the total judgments entered against D_2 and D_3 add up to $100,000, P may actually recover only $70,000. Second, under Article 14, all non-settling defendants have rights of contribution against other non-settling tortfeasors to the extent they pay P more than their Equitable Shares of the Remaining Liability. Thus, if D_2 is forced to pay more than $50,000 ($80,000 x 62.5%), D_2 has a right to recover the excess from D_3. D_3 has reciprocal rights to the extent D_3 pays more than $20,000 ($80,000 x 25%).[61]

CONCLUSION

Does the formula work the way it is supposed to? Yes. P's damages are $100,000. After the settlement with D_1 is removed, the damages remaining are $80,000. Because P was partially at fault, P cannot recover that full amount. P is responsible for 12.5% of that amount, meaning P should recover no more than $70,000.[62] Under the formula, that is exactly what P would be entitled to receive. Finally, the formula properly effects Article 16 by ensuring that D_3, a non-settling tortfeasor with 50% or less culpability, will have to pay no more than its equitable share of the non-economic damages, even if D_2 is insolvent.

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[61] Note that since D_3 gets the benefit of Article 16, it could not be forced to pay more than its equitable share of the non-economic damages. But, it might be forced to pay more than its share of the economic damages, and it would have a right to contribution for the excess paid.

[62] Although P was only 10% at fault, P must absorb more than 10% of the loss because P made a bad settlement with D_1. In a case in which the settlement amount exceeds the settling defendant's equitable share, P would split the windfall with the non-settling defendants and absorb less than its equitable share of the loss. *See supra* note 51 and accompanying text.